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Supreme Court, U.S.
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No. 00-786

IN THE

Supreme Court of the United States

KIM GATENA,

Petitioner,

v.

COUNTY OF ORANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Contrary to Gatena's Claim, the Eleventh Circuit Held That the Public Nudity Ordinance Was Content Neutral.

In its ruling, the Eleventh Circuit Court of Appeals in *Kim Gatena v. County of Orange*, 11th Cir. Case No. 99-14905 (July 11, 2000), held:

> In this case, the record indicates Appellee [Orange County] passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. *Following* [*City of Erie v.*] *Pap's* [*A.M.*, 120 S. Ct. 1382 (2000)], *this focus renders the ordinance content-neutral. See id.* The district court therefore was correct to analyze the ordinance under the *O'Brien* test. We further agree with the district court that the ordinance passes the *O'Brien* test.

Petition, p. 4a (emphasis added).

B. Contrary to Gatena's Argument, the Public Nudity Ordinance Uniformly Prohibits Public Nudity in All Public Places.

Contrary to the argument raised by Kim Gatena ("Gatena"), the Ordinance prohibits public nudity in every "public place," not just adult nightclubs. The Orange County Public Nudity Ordinance ("Ordinance") generally provides:

> (e) *Public nudity.* Subject to the exemptions set forth in subsection (f) below, it shall be unlawful for any person to knowingly or

> intentionally appear nude in a *public place*, or to knowingly or intentionally cause or permit another person to appear nude in a public place.

Petition, p. 39a, Orange County Code ("OCC") § 26-26(e).

The Ordinance defines "public place" to mean:

> any location open to the common and general use, participation or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment . . . , bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

Petition, p. 39a, OCC § 26-26(d)(5).

C. Contrary to Gatena's Argument, the Incidental Nudity Exemption Applies Uniformly to All Bona Fide Live Performances "Wherein Such Nudity Is Expressive Conduct Incidental to and Necessary for the Conveyance of a Genuine Message or Public Expression, and Is Not a Guise or Pretense Utilized to Exploit Nudity for Profit or Commercial Gain."

The Ordinance regulates the activity of being nude in public, subject to several exemptions, including the challenged "Incidental Nudity Exemption" codified in section (f)(2), which provides:

> (f) Exemptions. The offense of *public nudity* contrary to subsection (e) above shall not occur . . .
>
> (2) When the conduct *cannot constitutionally be prohibited* because
>
> [a] it constitutes a part of a bona fide live communication, demonstration or performance by such person
>
> [b] wherein such nudity is *expressive conduct*
>
> [c] *incidental to* and necessary for the conveyance or communication of a genuine message or public expression, and
>
> [d] is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*,

> [501] U.S. [560], 111 S. Ct. 2456, 115 L.Ed. 2d 504 (1991); and *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1977)); . . . .

Petition, pp. 39a-40a (emphasis, line breaks and lettering added).

A plain reading of the Ordinance shows that Gatena's narrow and magnified focus on the term "bona fide," without a consideration of the surrounding text, creates a warped and strained interpretation of a clearly constitutional ordinance.

To illustrate the use of the term "bona fide," assume that a business advertised itself as a "totally nude" restaurant, requiring its waiters and waitresses to work in the nude. The business, in an attempt to circumvent the Public Nudity Ordinance, may argue that the workers were "performing" their jobs and claim that the Ordinance allows nude workers. Upon review of each part of the Ordinance and exemption, it is clear that the exemption is not applicable to this hypothetical situation. First, the workers were not engaging in a bona-fide performance at all. Second, the nudity was not expressive conduct. Third, the nudity was not incidental to and necessary for the conveyance of a message. Fourth, the business was exploiting nudity for profit.

D. Gatena Was Never Charged with Violating the Ordinance and Presented No Evidence Regarding Any Application of the Ordinance.

This case involves a constitutional attack by Gatena, an individual who was *never arrested* for violating the Ordinance (*Petition*, page 7a) and who presented *no evidence*

regarding any actual application of the Ordinance to anyone, let alone to herself. Gatena's argument that the Ordinance inappropriately applies preferentially to some events and not to others is a hypothetical and speculative argument based upon an incorrect reading of the Ordinance.

E. Gatena's Supposed Personal Confusion Over the Meaning of the Term "Bona Fide" Is Legally Irrelevant.

It matters not what Gatena subjectively thinks of the term "bona fide" in the Ordinance or its meaning, or even whether her own personal confusion is not feigned. Instead, the test to determine whether a law is unconstitutionally vague includes whether the law may be understood by "the person of ordinary intelligence." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

F. The Deposition Testimony Concerning the Constitutionality of the Ordinance Is Irrelevant.

Similarly, the deposition testimony concerning the meaning and interpretation of the Ordinance is also irrelevant.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit noted that the record established that the Ordinance was passed because Orange County was concerned with the harmful secondary effects associated with public nudity. As a result, the Eleventh Circuit determined that the Ordinance was a content neutral regulation that passed the four-part test expressed in *United States v. O'Brien*, 391 U.S. 367 (1968).

Gatena does not take issue with the fact that the Ordinance properly passed the *O'Brien* test. Instead, Gatena argues the Ordinance should have been reviewed under the strict scrutiny standard merely because the Ordinance contained an exemption that allowed public nudity that "cannot constitutionally be prohibited." *Petition*, p. 40a, OCC § 26-26(f)(2). In other words, Gatena is challenging the Ordinance because the Ordinance *allows* nudity that "cannot constitutionally be prohibited . . . ." An Ordinance that allows public nudity that cannot constitutionally be prohibited should not be held to be unconstitutional simply because the Ordinance excludes what the Ordinance cannot constitutionally encompass.

Regarding Gatena's vagueness challenge, Gatena did not argue that the Eleventh Circuit's ruling conflicts with the decision of another United States court of appeals on the same important matter or that the Eleventh Circuit's ruling conflicts with any relevant decisions of the United States Supreme Court. Orange County is unaware of any conflicts with decisions of another United States court of appeals or this Court. In rejecting Gatena's vagueness challenge, the Eleventh Circuit followed the decisions of its sister courts as well as this Court.

A. The Eleventh Circuit's Ruling Does Not Conflict with *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000).

The Eleventh Circuit's ruling followed this Court's recent decision in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000). In its ruling, the Eleventh Circuit held:

> [I]n *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), the Supreme Court clarified that "government restrictions on public nudity . . . should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech," as long as the restrictions are "aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments . . . and not at suppressing the erotic message conveyed by . . . nude dancing." *Id.* at 1391-92. In this case, the record indicates Appellee passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. Following *Pap's*, this focus renders the ordinance content-neutral. *See id.* The district court therefore was correct to analyze the ordinance under the *O'Brien* test. We further agree with the district court that the ordinance passes the *O'Brien* test.

Petition, p. 4a.

B. The Eleventh Circuit's Ruling Does Not Conflict with Cases that Involve Content-Based Speech Regulations.

Cases involving content-based speech regulations are inapplicable to a content-neutral ordinance, like the Public Nudity Ordinance. In its ruling, the Eleventh Circuit held:

> In this case, the record indicates Appellee [Orange County] passed the ordinance because it was concerned with the harmful secondary effects associated with public nudity. *Following Pap's, this focus renders the ordinance content-neutral. See id.*

Petition, p. 4a (emphasis added).

C. The Eleventh Circuit's Ruling Does Not Conflict with *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975).

In *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975), the Town of North Hempstead, New York, enacted a regulation which made it unlawful to permit topless workers in a "cabaret, bar or lounge, dance hall, discotheque, restaurant or coffee shop," but not in an opera house, theater, playhouse or concert hall, ballet or movie. *Id.* at 1046-47. The *Salem Inn* court found:

> The Town [was] not concerned in its efforts to regulate this situation with obscenity or lewdness, the mere public or open display of nudity, the morals of minors . . . . Rather, the concern of the local government is with the conduct of the owners and operators of places serving either food or alcoholic beverage . . . .

Id. at 1047. As a result, the *Salem Inn* court held that the regulation was overbroad and violated the Equal Protection Clause.

In contrast, the Public Nudity Ordinance is not directed to specific establishments and applies to any "public place." Accordingly, Gatena's claim that the ruling conflicts with *Salem Inn* should be rejected.

D. The Eleventh Circuit's Ruling Does Not Conflict with *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D. N.Y. 1997).

In *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988, 990, n. 1. (N.D.N.Y. 1997), the District Court for the Northern District of New York found that:

> Schenectady's ordinance *targets only seven enumerated establishments*. Schenectady's ban is thus not a ban on nudity generally, but a targeted ban aimed at certain establishments.

Id. at 998 (emphasis added).

In contrast, the Public Nudity Ordinance is not directed at specific establishments, but rather applies uniformly to any "public place." Hence, the trial court's ruling in *Nakatomi* is clearly as distinguishable as *Salem Inn*.

E. Gatena's Interpretation of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) is Incorrect.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the United States Supreme Court rejected a stripper's

challenge to the constitutionality of an Indiana public indecency statute which facially prohibited the conduct of public nudity across the board, see *Barnes*, 501 U.S. at 569, n.2, but which had been previously given a narrowing construction by the Indiana Supreme Court to exempt "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Barnes*, 501 U.S. at 569, n.1 (quoting *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E. 2d 580, 587 (1979)). The Indiana statute resulted in exotic dancers at adult nightclubs having to wear pasties and G-strings.

As stated by the United States District Court, in *Gatena v. County of Orange*, 80 F. Supp. 2d 1331, 1337, n.7 (M.D. Fla. 1999):

> Gatena mistakenly argues that *Barnes* does not apply here because the public indecency statute there banned all nudity "across the board." *Barnes*, 501 U.S. 560, 566 (1991). On the contrary, five Justices recognized that the Indiana Supreme Court imposed a limiting construction on the Indiana Statute in *State v. Baysinger*, 272 Ind. 236, 247 (1979), much like the exemption language contained in the Ordinance here.

Petition, p. 18a, n.7.

F. The Eleventh Circuit's Ruling Rejecting Gatena's Vagueness Challenge Is Consistent with the Controlling Decision from the Eleventh Circuit.

The rejection of Gatena's vagueness challenge followed the controlling case law from the Eleventh Circuit.

The Eleventh Circuit held that the Incidental Nudity Exemption was "virtually identical to an exemption from the public nudity ordinance discussed in *Café 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994)." In *Café 207*, the district court concluded the exemption there was not unconstitutionally vague, stating:

> [A]n anti-nudity ordinance which is plainly intended to carve out non-obscene and therefore protected displays of nudity in artistically valuable theatrical performances cannot be condemned for facial vagueness, otherwise the obscenity laws, which must undertake the same chore . . . would necessarily suffer the same condemnation.

Id. at 650. The district court in *Café 207* reasoned, "[m]erely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague." *Id.* at 649.

The Eleventh Circuit affirmed the district court's ruling in *Café 207, Inc. v. St. Johns County*, 66 F.3d 272, 273 (11th Cir. 1995).

Finding the "Incidental Nudity Exemption" in Orange County's Public Nudity Ordinance to be "identical in every relevant aspect to the ordinance upheld against a vagueness challenge in *Café 207*," the Eleventh Circuit properly determined that *Café 207* was controlling and concluded that Orange County's Public Nudity Ordinance was not unconstitutionally vague. *Petition*, page 3a.

G. Regarding Gatena's Vagueness Challenge, Gatena Did Not Argue That There Was a Conflict in Decisions or That This Was an Issue of Great Importance.

Regarding Gatena's vagueness argument, Gatena did not and could not argue that there was a conflict in decisions among the courts as to the constitutionality of the Incidental Nudity Exemption, or that this is an issue of great importance.

The Eleventh Circuit's ruling is in accord with key decisions of this Court. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976), the United States Supreme Court refused to consider a vagueness challenge to an ordinance that regulated adult theaters. The vagueness challenge was based, in part, upon the phrase "characterized by an emphasis" on matters depicting, describing or relating to specified sexual activities or specified anatomical areas. Finding that any alleged vagueness did not affect the theaters, the United States Supreme Court held that:

> [W]e see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." . . . [S]ince the limited amount of uncertainty in the ordinances is easily susceptible to a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id. at 61.

Similarly, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the United States Supreme Court rejected a vagueness challenge to an antinoise ordinance, stating:

> [W]e conclude that the antinoise ordinance is not impermissibly vague. . . .
>
> . . . Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," . . . , but we think it is clear what the ordinance as a whole prohibits.
>
> . . . As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. . . .

Id. at 109-10 & 114.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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